Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-828

H. BARRY RESSLER and OSCAR M. WILLIAMS,

Petitioners

versus

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO.

H. BARRY RESSLER and OSCAR M. WILLIAMS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

Petitioners H. Barry Ressler and Oscar M. Williams respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 14, 1978.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 576 F.2d 650 and appears in the appendix hereto. The Opinion rendered by the District Court for the Southern District of Florida appears in the appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 14, 1978. A timely petition for re-

hearing was denied on September 5, 1978, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

1. Whether the tolling of the statute of limitations under 26 U.S.C. (I.R.C. 1954) § 6502(a) by an offer of compromise of civil tax liability terminate (when the taxpayer is indicted for filing a false financial statement in connection with the offer of compromise) or on the date when the defendant pled guilty and was sentenced rather than on the date the offer was "officially" rejected by the government subsequent to the sentencing date.

## STATEMENT OF THE CASE

H. Barry Ressler had a series of tax assessments placed against him with the earliest assessment involved in the present case being made on April 8, 1965. On August 1, 1975, the United States filed a civil suit to collect unpaid taxes and to set aside as fraudulent certain conveyances of real property made by the petitioner Ressler. Following a non-jury trial, the District Judge found the conveyances of real property to be fraudulent and rendered null and void by Florida law and further determined that petitioner, Ressler is indebted to the United States for tax liability in the amount of $33,619.01 plus statutory additions.

Petitioners appealed to the Fifth Circuit raising the issue whether this suit was barred by the Internal Revenue Code's 6-year statute of limitations for collection after assessments



26 U.S.C.A. § 6520(a) inasmuch as the bulk of the assessments involved were assessed more than six years prior to the commencement of the government action. The Fifth Circuit held that the action was not barred by the statute of limitations as the latter was extended by Ressler making an offer of compromise of his tax liabilities containing a waiver, which waiver was accepted by the IRS on January 6, 1970.

The offer in question is delineated on IRS' standard Form 656 and contains the following provision extending the statute of limitations:

> The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter.

Petitioner's offer to compromise was submitted December 8, 1969 and was accepted by IRS for waiver purposes on January 6, 1970.

Petitioner was indicted in 1972 for filing a false financial statement in connection with his offer of compromise. He pled guilty and was sentenced on *February 26, 1973.*[1]

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1. The legal effect of the government's indictment and/or petitioner's guilty plea and sentencing will be discussed in the reasons for granting the writ, *infra.*

Notwithstanding its indictment, and the sentencing of the defendant, the government "officially" rejected the offer of compromise on May 3, 1973.

Briefly, the limitations period for commencing the suit as calculated by the Fifth Circuit was as follows: The date of the earliest assessment was April 8, 1965. Accordingly, the six-year statute of limitations would have expired on April 8, 1971. That was extended by the offer of compromise, however, by four years, three months and twenty-seven days or until August 4, 1975. This calculation by the Fifth Circuit enabled it to find that the suit was timely commenced by the government on August 1, 1975, within the period of the statute of limitations as extended by the parties' agreement.

Petitioner's calculations as to the date on which the statute of limitations had run barring any suit to collect unpaid taxes subsequent to that date is as follows: The offer of compromise was made by petitioner on December 8, 1969, but the District Director of the IRS did not sign the form accepting the waiver until January 6, 1970. It is on this latter date the suspension of the running of the limitations period commenced. Petitioner computes that the acceptance of the waiver by the government in the offer of compromise on January 6, 1970 was terminated by the government when the defendant pled guilty and was sentenced on February 26, 1973 (if not when the indictment was filed).

Thus, the statute of limitations under petitioner's theory (as noted by the Fifth Circuit) was extended for three years, one month and twenty days, plus the additional one year granted by the agreement. When that period is added to the normal expiration date of April 8, 1971, the statute of limi-



tations would expire on May 28, 1975. Since the complaint was not filed until some two months later, on August 1, 1975, the government's suit would be untimely.

The Fifth Circuit held that although the Ninth Circuit in *Coy v. United States*, 377 F.2d 925 (9th Cir. 1967), would support petitioner's position, the Fifth Circuit would hold to the contrary. Accordingly, the Fifth Circuit held that where a taxpayer is indicted for filing a false financial statement in connection with an offer of compromise of civil tax liability, the compromise offer does not terminate, for limitation purposes, on the date on which the taxpayer-defendant pleads guilty and is sentenced; but, rather, the offer terminates on the date on which it is "officially" rejected by the government.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE TERMINATION OF THE TOLLING OF THE STATUTE OF LIMITATIONS UNDER 26 U.S.C.A. (I.R.C. 1954) SECTION 6502(a), WHERE THE TAXPAYER IS INDICTED, PLEADS GUILTY AND SENTENCED FOR COMMITTING FRAUD IN THE OFFER TO COMPROMISE THE TAX LIABILITY.

*Coy* involved the same issue as the case, *sub judice*, In *Coy* the 9th Circuit (in a thorough analysis of the obvious Congressional scheme in promulgating the limitations statute) stated that the purpose of tolling the statute is to give the proper agents time to consider and investigate the offer. The Court pointed out that it is reasonable that the govern-

ment should have the statute tolled while it is considering the offer. But in *Coy*, as in the instant case, the tax collector found fraud in the very offer of compromise. In *Coy* as in the instant case the tax collectors arranged for the prosecution of the offeror of the compromise for the alleged fraud in the offer. The Ninth Circuit soundly held:

> We have trouble with the concept that the government should have further time to consider an offer that reeked with discovered fraud. To have accepted the offer would have made those who accepted it as bad as Coy. They would be subject to the same condemnation as the army contract officer who waived the fraud in . . . .

Thus the Ninth Circuit held that the date that the sentence was imposed on Coy started the statute of limitations running again. (In fact, the Ninth Circuit went even further, as this Court itself may decide to do, and stated that the date of the indictment might be taken as the date of rejection of the offer).

Of importance, the Ninth Circuit opined that its decision will not deprive the government of any substantial amounts of money but the government now should be *"forewarned"* so that it will be able to act in time. As is usually the case, the government ignored the admonition issued by the Ninth Circuit that (possibly the bringing of the indictment) but certainly at the time of sentencing for a conviction for fraud in an offer of compromise, the suspension of the statute of limitation term inates and the statute of limitations starts to run. Here, the government acted directly contrary to a judicial proscription and through the beneficence of an unsound decision issued by the Fifth Circuit was saved from the bar of the statute of limitations.



The Fifth Circuit announced its direct conflict with *Coy* when it stated:

> We decline to adopt the *Coy* decision as the rule in this Circuit. We find no reasons why proceedings in a criminal matter should have any effect on whether even a related civil matter can be compromised. There is nothing necessarily inconsistent from the government's standpoint in prosecuting for fraud and still considering an offer of compromise of the civil liability for tax. The prosecuted taxpayer is not left unprotected: if he thinks that the prosecution is inconsistent with acceptance of his offer of compromise, he can withdraw the offer upon notice to the Government, and thus terminate the toll on the statutes of limitations. Accordingly we reject *Coy's* reasoning.

The reasoning of the Fifth Circuit that there is nothing necessarily inconsistent from the government's standpoint in prosecuting for fraud and still considering the offer of compromise for the civil liability for tax is unsound. Of course the civil and criminal side of tax collection can operate independently and criminal prosecution has little to do with civil liability, and vise versa. But to maintain this latter stated principle under all facts and circumstances of the case is to create a legal fiction. For the Fifth Circuit is giving to the government the best of two worlds, i.e., the right to prosecute the taxpayer for committing fraud in the offer of compromise, and the right to keep open the offer of compromise

and concommitantly toll the statute of limitations. Since the government would be lending its approbation to fraud if it were to accept the offer of compromise, as the Fifth Circuit approves by its decision – that Court, in effect, sanctions fraudulent conduct by the government by leaving the latter with the option to accept a *crimen falsi* act.

Accordingly, as a result of the square conflict between the Fifth and Ninth Circuits on an important question of Federal law, this Court should grant certiorari to review the judgment below.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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## APPENDIX A

Opinion of United States Court of Appeals,
Fifth Circuit

UNITED STATES of America,
Plaintiff-Appellee

v.

H. Barry RESSLER and Oscar M. Williams,
Defendants-Appellants

No. 77-2837
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit

July 14, 1978

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM

On August 1, 1975, the United States filed this civil suit to collect unpaid taxes and to set aside as fraudulent certain conveyances of real property made by defendant Ressler. After a nonjury trial, the district judge found that the conveyances of the real property were fraudulent as to the United States and therefore rendered null and void by Florida law, and that defendant Ressler is indebted to the United

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409,Part 1

States for tax liabilities in the amount of $33,619.01 plus statutory additions. Defendants appealed.

The sole issue which we discuss on this appeal is whether this suit is barred by the Internal Revenue Code's six-year statute of limitations for collection after assessments, 26 U.S.C.A. § 6502(a), since the bulk of the assessments involved were assessed more than six years prior to the commencement of this action. We hold that the action was timely, because the statute of limitations was extended by an agreement between defendant Ressler and the Government to beyond the date on which the complaint was filed.

The earliest assessment involved in the present suit was made on April 8, 1965. Thus, without more, the statute of limitations on collecting such assessments would have run six years later on April 8, 1971.

On December 8, 1969, defendant Ressler made an offer of compromise of his tax liabilities. The offer, set forth on the Internal Revenue Service's standard Form 656, contained the following provision extending the statute of limitations:

> 6. The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter.



[1] The purpose of giving a waiver, in connection with an offer of compromise, is to enable the Government to consider the offer without suffering prejudice because of the running of the statute of limitations against the collection of the tax while the offer is being considered. *United States v. Harris Trust & Savings Bank*, 390 F.2d 285, 287-288 (7th Cir. 1968); *United States v. Havner*, 101 F.2d 161, 163 (8th Cir. 1939). The District Director of the IRS signed the form, thereby accepting the waiver, on January 6, 1970. It is on that date that the suspension of the running of the limitations period commenced. *United States v. Cook*, 494 F.2d 573, 575 (5th Cir. 1974).

[2] The running of the statutory period is suspended until the offer of compromise is terminated, withdrawn, or formally rejected. *See Myrick v. United States*, 296 F.2d 312 (5th Cir. 1961). In addition, it is suspended for one additional year, as provided by the terms of the offer.

[3] In this case, the offer of compromise was rejected by the Government on May 3, 1973. Thus, the offer of compromise was pending from January 6, 1970 until May 3, 1973, a period of 3 years, 3 months and 27 days. In addition, the agreement calls for an extension of one additional year, for a total extension of 4 years, 3 months and 27 days. As noted earlier, since the earliest assessment was that of April 8, 1965, the six-year statute of limitations would have expired on April 8, 1971. That was extended by the offer of compromise, however, by 4 years, 3 months and 27 days, or until August 4, 1975. Suit was commenced by the Government on August 1, 1975, within the period of the statute of limitations as extended by the parties' agreement. The suit was therefore timely commenced. *See United States v. Moyer,*

308 F.Supp. 754 (W.D.Pa. 1968), *aff'd per curiam*, 420 F.2d 375 (3d Cir.), *cert. denied*, 400 U.S. 819, 91 S.Ct. 36, 27 L.Ed.2d 46 (1970).

[4] Defendant Ressler contends, however, that an earlier date must be set as the termination date of the offer. Defendant was indicted in 1972 for filing a false financial statement in connection with this offer of compromise. He pled guilty and was sentenced on February 26, 1973. Defendant contends that this date, rather than May 3, 1973 when the Government officially rejected his offer, should determine the termination date of the offer of compromise. If the date of sentencing is chosen, the statute of limitations as extended would have expired on May 28, 1975.

Defendant's computation is as follows: the offer of compromise was made on January 6, 1970, and terminated when defendant was sentenced, on February 26, 1973, for an extension period of 3 years, 1 months and 20 days, plus the additional one year granted by the agreement. When that period is added to the normal expiration date of April 8, 1971, the statute of limitations would expire on May 28, 1975. Since the complaint was not filed until some two months later, on August 1, 1975, the Government's suit would be untimely.

In support of his position, defendant cites *Coy v. United States*, 377 F.2d 925 (9th Cir. 1967), where the Ninth Circuit so held. We decline to adopt the *Coy* decision as the rule in this Circuit. We find no reason why proceedings in a criminal matter should have any effect on whether even a related civil matter can be compromised. There is nothing necessarily inconsistent from the Government's standpoint in prosecuting for fraud and still considering an offer of compromise of the civil liability for tax. The prosecuted taxpayer is not left unprotected: if he thinks that his prosecution is inconsistent with acceptance of his offer of compromise, he can withdraw the offer upon notice to the Government, and thus terminate the toll on the statute of limitations. Accordingly, we reject *Coy's* reasoning.



The complaint in this suit was, therefore, not time barred. Defendants' other contentions are meritless.

AFFIRMED.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2837
Summary Calendar

D. C. Docket No. CA 75-1524-Civ-SMA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

H. BARRY RESSLER and OSCAR M. WILLIAMS,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

Before RONEY, GEE and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;



ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 14, 1978

Issued As Mandate:

APPENDIX C
Order Denying Petitions for Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77 - 2837

Filed: Sep. 5, 1978

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

H. BARRY RESSLER & OSCAR M. WILLIAMS,
Defendants-Appellants

Appeal from the United States District Court for the
Southern District of Florida

ON PETITIONS FOR REHEARING
(September 5, 1978)

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:
S/ Paul H. Roney
United States Circuit Judge



APPENDIX D

Amended Final Judgment and Order of Sale

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

Filed: July 6, 1977

UNITED STATES OF AMERICA,
Plaintiff

v. CIVIL NO. 75-1524-Civ-SMA

H. BARRY RESSLER, et al.,
Defendants

AMENDED FINAL JUDGMENT AND ORDER OF SALE

In accordance with the Findings of Fact and Conclusions of Law entered in this matter, the Court finds that defendant H. Barry Ressler is indebted to plaintiff, United States of America, for unpaid federal taxes, plus statutory additions thereto. The Court further finds that the subject conveyances of real property on February 13, 1961 by defendant Ressler to defendants Tavel and Williams, and on September 15, 1969 by defendant Williams to Harriet Williams, were fraudulent as to plaintiff, United States of America, and are therefore rendered null and void by operation by the law of the State of Florida.

It is therefore ORDERED, ADJUDGED and DECREED that defendant H. Barry Ressler is indebted to plaintiff,

United States of America, for tax liabilities as alleged in the Complaint in the amount of $33,619.01, plus statutory additions thereto.

It is further ORDERED, ADJUDGED and DECREED that the United States of America has a valid and subsisting lien upon the real property which is the subject matter of this action, the house and lot located at 11920 S.W. 89th Avenue, Miami, Dade County, Florida, the legal description of which is "lot 5 of Sun Grove Estate, according to the Plat thereof recorded in Plat Book 64, at p. 14 of the Public Records of Dade County, Florida."

It is further ORDERED, ADJUDGED and DECREED that the federal tax lien attaching to the above-described property be foreclosed and the property be sold at auction in accordance with Sections 2001 and 2002, Title 28, United States Code, in the manner hereinafter set forth, and that the above-described property shall be sold free and clear of all liens and claims of all the parties to this action.

It is further ORDERED, ADJUDGED and DECREED that the United States Marshal in and for the Southern District of Florida be and hereby is authorized to offer for sale at public auction the property described herein; that such public sale shall be held in Dade County, Florida, on September 1, 1977, at an hour and place to be announced by the United States Marshal, after first being advertised at least once each week for four consecutive weeks preceding September 1, 1977, in a daily newspaper of general circulation in Dade County, Florida, and by such other notice as the United States Marshal in his discretion shall deem appropriate; that no bids (except as to the United States) shall be accepted unless the same is accomplished by a certified check or cash



deposit of at least ten (10%) percent of the amount of the bid, except that defendant Provident Mutual Life Insurance Co., may bid the unpaid balance of its mortgage on the property, said amount to be established by further order of this Court, without accompanying said bid with the required 10% deposit; that the balance of the purchase price shall be tendered to the United States Marshal by the successful bidder within seven (7) days following the date of sale in the form of a certified check or cash, and that upon a default by the purchaser in fulfilling this requirement, the deposit made by him shall be forfeited and retained by the Marshal as part of the proceeds of sale, and the property shall again be offered for sale in the same manner as set forth above. The property shall be offered for sale subject to confirmation by this Court, and upon such confirmation and receipt of the balance of the purchase price, the United States Marshal shall deliver to the purchaser of the real property a deed conveying said property to the successful purchaser.

It is further ORDERED, ADJUDGED and DECREED that the proceeds of the sale, less the expenses thereof, shall be remitted by the Marshal to the Clerk of this Court. The liens and claims of the parties to this action shall attach to the proceeds of the sale with the same validity, priority and rights which said liens and claims enjoyed upon the subject real property. The proceeds of sale shall be held by the Clerk for distribution to the parties hereto in accordance with further orders of this Court.

It is finally ORDERED, ADJUDGED and DECREED that plaintiff, United States of America, have a judgment against the defendant H. Barry Ressler, for any portion of the indebtedness of defendant Ressler which remains unpaid after

disposition of the proceeds from the sale of the aforementioned property.

Done and Ordered at Miami, Florida, this 5th day of July, 1977.

s/ Sidney M. Aronovitz
United States District Judge